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FAIRMONT SPECIALTY INSURANCE COMPANY and TEG INSURANCE COMPANY... IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA 9 FOR THE COUNTY OF CONTRA COSTA 10 11 PAIRMONT SPECIALTY INSURANCE CASE NO.: C 0 7 COMPANY, a Delaware corporation, and TIG)
INSURANCE COMPANY, a California 12 corporation, 13 Plaintiffs. 14 COMPLAINT FOR RELIEF AND DECLARATORY 15 CONTRIBUTION INSURANCE CORPORATION OF NEW YORK, B New York corporation, DEPENDABLE SHEET METAL, & California PER LOCAL RULE 5 THIS 17 perperation, and DOBS 1 through 10, CASE-IS ASSIGNED TO 18 Defendants. 19 SUMMONS ISSUED .20 COMES NOW Plaintiffs Fairmont Specialty Insurance Company and TIG Insurance Company, and, by way of this Complaint against Defendants Insurance Corporation of New York, .21 Dependable Sheet Metal, and Doss I through 10, hereby allege as follows: 22 23 THE PARTIES 24 Fairmont Specialty Insurance Company was formerly named Ranger Insurance Company (herzinafter Fairmont will be identified as "Ranger"). At all relevant times berein, Rangar is a corporation sutherized to do business, and is doing business, under the laws of the State of 26 27 Dolaware. 28 COMPLAINT G. 1207 Personal Completed, Layed

EXHIBIT F

. 1	2. TIG Insurance Company was formerly named Transamerica Insurance Company							
2	(heromafter TIG will be identified as "Transamerica"). At all relevant times herein, Transamerica							
3.								
4	California,							
5	3. At all relevant times herein, Insurance Corporation of New York ("Inscorp") was and							
б	is a corporation authorized to do business, and is doing business, under the laws of the State of New							
7	York,							
8	4. At all relevant times herein, Dependable Sheet Metal ("Dependable") was and is a							
9								
10	California.							
11	5. The true names and capacities, whether individuals, corporations, partnerships							
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14	names and capacities when the same have been ascertained.							
15	GENERAL ALLEGATIONS							
16	 This action arises from underlying construction defect lawsuits, including but not 							
17	limited to at least twelve (12) underlying construction defect lawsuits (the "Dependable actions")							
. 38	ontified:							
19	a. Gary Kaiser, et al. v. KB Homes, et al., Contra Costa County Superior Count							
20	case number C05-00991.							
.21	b. Tamaz Abzartan, et al. v. Richland Development Corporation, et al., Conve							
.22	Costa County Superior Court case number C05-00147.							
.23	o. Lorna Balaky, et al. v. The Presley Companies, et al., Course Costa County							
.24	Superior Court case number C05-00837.							
25	d. Ron Capella, et al. v. Kaufman Broad of Northern California, et al., Alameda							
26	County Superior Court case number RG 06259608.							
27	c. leff Crawford, et al. v. Western Pacific Housing, et al., El Dorado County							
28	Superior Court case number PC 20050255.							
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1	f. Charles Edwards, et al. v. Suncrest Homes, et al., Contra Costa County							
2	Superior Court case number C05-00387.							
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4	Contra Costa County Superior Court case number C06-01580,							
5	h. John Craig, et al. v. KB Homes, et al., Contra Costa County Superior Court							
6_								
7	i. Beck et al. v. Presley, et al., Alameda County Superior Court case number							
8	H 213382-3.							
9	j. Kenneth James, et al. v. Dependable Sheet Metal, et al., Contra Costa County							
10								
11	k. O'Neill, et al. v. Presley, et al., Alameda County Superior Court case number							
12	H 214815-5.							
13	. 1. Thiara Rajendrapal, et al. v. William Lyon, et al., Alameda County Superior							
14	Court case number HG 04167197.							
15	7. Plaintiffs are informed and believe and thereon allege that Dependable was named							
16	as a Defendant or Cross-Defendant in the Dependable actions. Dependable, either directly or							
17	through others acting on its behalf, provided notice of the Dependable actions and tendered							
18	Dependable's defense and indomnity to Inscorp, Ranger, and Transamerica.							
19	8. Plaintiffs are informed and bolieve and thereon alloge that Dependable was insured							
20	under commercial general liability insurance policies (the "Dependable policies") issued by Inscorp,							
21	Ranger, and Transamerica as follows:							
22 ,	A Transamerica policy, number 77-35026957, effective from August 9, 1993,							
23	to August 9, 1994.							
24	b. Transamerica policy, number T7-35026957, effective from August 9, 1994,							
25	to August 9, 1995.							
26	c. Transamerica policy, number T7-35026957, effective from August 9, 1995,							
27	to August 9, 1996.							
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underlying claimants alleged that defective construction and/or property damage were first dissevered within three (3) years prior to the filling dates of the claimants' initial Complaint.

12. Plaintiffs are informed and believe that, in each of the Departable actions, the

Plaintiffs are informed and believe that, in each of the Dependable actions, the

- 12. Plaintiffs are informed and believe that, in each of the Departable actions, the underlying claimants filed their initial Complaints more than three (3) years after the end of the last Inscorp policy period on December 1, 2001.
- 13. Plaintiffs are informed and believe that, in each of the Dependable actions, Inscorp, citing the policy provisions alleged in paragraph 16 above, declined Dependable's tender of defense. Inscorp informed Dependable that the underlying claimants alleged "that the defects first manifest within three years of the Gling of the Complaint... This was after the expiration of your INSCORP policy and therefore not covered" or words to that effect.
- Plaintiffs are informed and believe that, in each of the Dependable actions, Inscorp, in reliance upon the policy provisions alleged in paragraph 10 above, declined Dependable's tender of defense and failed to consider other possible manifestation times. According to the Inscorp endorsement, harm could manifest when: (1) the insured knows of appreciable harm; (2) the insured should have known of appreciable harm; (3) the claimant knows of appreciable harm; or (4) the claimant should have known of appreciable harm. Inscorp solely focused upon when the claimant alleged that it knew of appreciable harm and ignored at least three other possible times for manifestations of damage as provided for in its own endorsement, manifestations that could easily be within Inscorp's policy period.
- 15. Plaintiffs are informed and believe that, in each of the Dependable actions, inacorp, in reliance upon the policy provisions alleged in paragraph 10 above, declined Dependable's tender of defense also in contravention of the holding in Garriott Crop Dusting Co. v. Superior Court (1990) 221 Cal.App.3d 783, which provides that an insurer cannot rely on a claimant's allegation regarding the statute of limitations as a coverage defense.
- 16. Plaintiffs are informed and believe that, in each of the Dependable actions, Inscorp, in reliance upon the policy provisions alleged in paragraph 10 above, declined Dependable's tender

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of defense in order to avoid being required to provide Dependable with independent counsel pursuant

17:-- Plaintiffe are informed and believe that, in each of the Departuble actions. Inscorp. was a "recalcitrant" insurer, within the meaning of Safeco Insurance Company v. Superior Court (2006) 140 Cal. App. 4th 874. Therefore, all of the damages alleged by the claimants in each of the Dependable actions are presumed to have occurred exclusively within Inscorp's policy period(s) and Inscorp's scope of coverage.

FIRST CAUSE OF ACTION

(Declaratory Rollef Against All Defendants)

- Plaintiffs incorporate by reference paragraphs 1 through 17 as though fully set forth 18. herein.
- An actual controversy has arisen and now exists between Plaintiffs, on the one hand, 19. and Defendants, on the other hand, concerning their respective rights and obligations in the Dependable actions, including those under the Dependable policies. Plaintiffs allege that inscorp had and has a duty to defend and/or indemnify Dopendable against the Dependable actions under one or more of the general liability insurance policies issued by inscorp, as alleged in paragraphs 8(e) to 8(f) above.

SECOND CAUSE OF ACTION

(Equitable Contribution Against Inscorp)

- Plaintiffs incorporate by reference paragraphs 1 through 17 as though fully set forth 20. herein.
- If Plaintiffs provided a defense and/or indeconification for Dependable under any of 21. the Dependable actions, Plaintiffs are entitled to equitable contribution from Inscorp in an amount to be proved at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for judgment against Defendants, and each of them, as follows:

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1	1. For a judgment declaring the respective rights and obligations of Plaintiffs and									
<u></u>	Defendants under the Dependable policies for the claims asserted in the Dependable actions;									
	2. For a judgment declaring that Inscorp had and has a duty to defend Dependente									
5	against the Dependable actions under one or more of the general liability insurance policies issued by Inscorp, as alleged in paragraphs 8(c) to 8(f) above;									
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. 6		For a judge		·		Y no ej .	113.			
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9		4. For damages according to proof;								
10		5. For an award of Plaintiffs' costs in this action; and6. For other and further ratiof as the Court deems just and proper.								
11.	6,	For other a	nd Lurtho	r relief	as the Co	ourt deem	s just and ;	proper.		
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SUMMONS

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- In response to Paragraph 2, Dependable Sheet Metal lacks sufficient information 2. and belief to either admit or deny the allegations set forth in Paragraph 2.
- In response to Paragraph 3, Dependable Sheet Metal has insufficient information 3. to either admit or deny the allegations set forth in Paragraph 3.
- In response to Paragraph 4, Dependable Sheet Metal admits the allegations set 4. forth in Paragraph 4.
- 5. In response to Paragraph 5, Dependable Sheet Metal lacks sufficient information and belief to either admit or deny the allegations set forth in Paragraph 5.
- 6. In response to Paragraph 6, Dependable Sheet Metal admits the allegations set forth in Paragraph 6 to the extent that the twelve underlying construction defect lawsuits are at issue between the parties. However, there may be additional disputes arising from undefined, underlying construction defect lawsuits not identified or alleged in Plaintiffs' Complaint.
- In response to Paragraph 7, Dependable Sheet Metal admits the allegations set 7. forth in Paragraph 7.
- 8. In response to Paragraph 8, Dependable Sheet Metal admits the allegations set forth in Paragraph 8.
- 9. In response to Paragraph 9, Dependable Sheet Metal contends the allegations set forth in Paragraph 9 are vague, ambiguous and uncertain and thus, Dependable Sheet Metal lacks sufficient information and belief to fully answer and respond to the allegations set forth in Paragraph 9. However, to the extent that Fairmont and/or TIG alleges that it provided a defense or indemnification to an underlying action entitled Robert B. Cohen, et al. v. Presley Homes, et al., Contra Costa County Superior Court Case No. MSC06-02548 ("Cohen Action"), deny. To the extent that Paragraph 9 alleges that Fairmont and/or TIG provided indemnification to Charles Edwards, et al. v. Suncrest Homes at Dallas Ranch, LP, Contra Costa County Superior Court Case No. C05-00387 ("Edwards Action") and Gary Kaiser, et al. v. KB Homes, et al., Contra Costa County Superior Court Case No.

- C05-00991 ("Kaiser Action"), Dependable Sheet Metal denies any indemnification was provided to Dependable Sheet Metal by either Fairmont and/or TIG. Finally, a Counterclaim is filed against Fairmont and TIG with respect to these underlying lawsuits (see, Counter-Claim).
- 10. In response to Paragraph 10, Dependable Sheet Metal admits that Inscorp improperly declined to provide a defense and/or indemnification for Dependable Sheet Metal under each of the Dependable Actions. Dependable Sheet Metal lacks information and belief as to what the denials were based on, in whole or in part, other than what was stated in the letters of denial, issued by Inscorp. Dependable Sheet Metal denies the remaining allegations contained in Paragraph 10 including, but not limited to, the allegation stating that the subject exclusionary language was contained in any policy sold by Inscorp to Dependable Sheet Metal.
- 11. In response to Paragraph 11, Dependable Sheet Metal lacks sufficient information and belief that in each of the underlying/Dependable Sheet Metal actions, the underlying claimants alleged that defective construction and/or property damage was first discovered within three years prior to the filing dates of the claimants' initial Complaint.
- 12. In response to Paragraph 12, Dependable Sheet Metal lacks sufficient information and belief to either admit or deny the allegations set forth in Paragraph 12.
- 13. In response to Paragraph 13, Dependable Sheet Metal denies the allegations set forth in Paragraph 13 to the extent that the quoted language was contained in the subject Inscorp policy. Dependable admits the remaining allegations set forth in Paragraph 13.
- 14. In response to Paragraph 14, Dependable Sheet Metal lacks sufficient information and belief as to what Insurance Corporation of New York ("Inscorp") relied upon and, specifically, what policy provisions alleged were relied upon by Inscorp. Dependable Sheet Metal admits that Inscorp denied Dependable Sheet Metal's tender of defense on each of the underlying/Dependable Sheet Metal actions.

- 15. In response to Paragraph 15, Dependable Sheet Metal denies the Inscorp policy contained the subject policy provisions relied upon by Inscorp. Dependable Sheet Metal admits the remaining allegations set forth in Paragraph 15 and further, Dependable Sheet Metal contends that Inscorp, in declining coverage to Dependable Sheet Metal, violated *Chu v. Canadian Indemnity Co.*, 224 Cal.App.3d 86 (1990); *Montrose Chemical Company v. Admiral Ins. Co.*, 10 Cal.4th 645 (1995). Moreover, Inscorp never provided any written admonishment to Dependable Sheet Metal of the inclusion of the endorsement pertaining to manifestation of property damage as the purported basis of the trigger of coverage and therefore, said endorsement has no legal or operative affect.
- 16. In response to Paragraph 16, Dependable Sheet Metal admits the allegations set forth in Paragraph 16.
- 17. In response to Paragraph 17, Dependable Sheet Metal admits the allegations set forth in Paragraph 17.

FIRST AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

As and for a first separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that the Complaint filed by Fairmont and TIG fails to state facts sufficient to constitute a cause of action against General Coatings.

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SECOND AFFIRMATIVE DEFENSE

(Waiver)

As and for a second separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that the Complaint is barred, in whole and in part, by the doctrine of waiver.

THIRD AFFIRMATIVE DEFENSE

(Estoppel)

As and for a third separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that the Complaint is barred, in whole and in part, by the doctrine of estoppel.

FOURTH AFFIRMATIVE DEFENSE

(Laches)

As and for a fourth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that the Complaint is barred by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

(Unclean Hands)

As and for a fifth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that the Complaint is barred by the doctrine of unclean hands.

SIXTH AFFIRMATIVE DEFENSE

(Failure to Defend and/or Fund Settlement)

As and for a sixth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that Fairmont, and TIG/Inscorp have a duty to defend and indemnify based on the events alleged in the underlying construction defect action.

SEVENTH AFFIRMATIVE DEFENSE

(Coverage was provided for Covered Operations resulting in Damage Sustained under Each Policy at Issue)

As and for a seventh separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that the Complaint against Dependable Sheet Metal is barred,

CASE NO. C07-03421 JL

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in whole and in part, by the terms, definitions, exclusions, conditions, provisions and limitations contained in the Fairmont, TIG and Inscorp policies and, specifically, those insurable risks agreed to be insured by Fairmont, TIG and Inscorp with respect to damage to tangible property occurring during the effective dates of each policy at issue.

EIGHTH AFFIRMATIVE DEFENSE

(Reformation)

As and for a eighth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that the policy issued by Inscorp does not reflect the mutual assent of the parties and any specific endorsements set forth in the policy were issued by mutual mistake, unilateral mistake or fraud as coverage was intended for property damage sustained during the effective dates of each of the Inscorp policies.

NINTH AFFIRMATIVE DEFENSE

(Breach of Implied Covenant of Good Faith and Fair Dealing)

As and for a ninth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that Fairmont, TIG and Inscorp breached the implied covenant of good faith and fair dealing, as well as breached the terms and conditions of the policy in refusing to deny coverage and performed inadequate claims handling investigation and evaluation and made an improper coverage determination.

TENTH AFFIRMATIVE DEFENSE

(Occurrence)

As and for a tenth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that the claims made in the underlying action reflect property damage arising out of an occurrence within the meaning of the Fairmont, TIG and Inscorp policies.

ELEVENTH AFFIRMATIVE DEFENSE

(Violation of Insurance Code and Regulations)

As and for a eleventh separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that Plaintiffs' Complaint is barred by Fairmont,

CASE NO. C07-03421 JL

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TIG and Inscorp's violation of pertinent provisions of the Insurance Code, including but not limited to Insurance Code Section 790.03, et seq., and the insurance regulations promulgated by the Department of Insurance.

TWELFTH AFFIRMATIVE DEFENSE

(Violation of Evidence Code)

As and for a twelfth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that Plaintiffs' Complaint is barred by Fairmont, TIG and Inscorp's violation of pertinent provisions of the Evidence Code, including but not limited to Evidence Code Cection 950, et seq.; see also, Solin v. O'Melveny & Myers, LLP, 89 Cal.App.4th 451 (2001).

THIRTEENTH AFFIRMATIVE DEFENSE

(Failure to Disclose)

As and for a thirteenth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that Fairmont, TIG and Inscorp misrepresented to Dependable Sheet Metal pertinent facts of the insurance policy and failed to disclose properly and fully the exclusions at the time the policy was entered into between Fairmont, TIG and/or Inscorp and Dependable Sheet Metal.

FOURTEENTH AFFIRMATIVE DEFENSE

(Improper Investigation of Underlying Claims)

As and for a twelfth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that Plaintiffs' Complaint is barred by the failure of Fairmont, TIG and Inscorp to, and at all time, implement reasonable standards for a prompt, full and complete investigation and processing of Dependable Sheet Metal's entitlement to coverage with respect to each underlying action referenced in Plaintiffs' Complaint.

FIFTEENTH AFFIRMATIVE DEFENSE

(Unjust Settlement Claims Practices)

As and for a twelfth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that Fairmont, TIG and Inscorp have failed to deal with Dependable Sheet Metal with the utmost good faith and that at all material times has exhibited unfair and unjust settlement of claims practices in which liability and coverage for such has become reasonable clear.

SIXTEENTH AFFIRMATIVE DEFENSE

(Coercion/Undue Influence/Oppression)

As and for a sixteenth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that Fairmont, TIG and Inscorp have acted coercively, with undue influence and with oppression and fraud by compelling its insured to enter into litigation in order to obtain coverage benefits owed under the terms of the subject policy and, as such, Fairmont and TIG's action should be barred.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

As and for a seventeenth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that Plaintiffs' Complaint, and each and every cause of action contained therein, is barred by the applicable statute of limitations, including specifically, but not exclusively, California Code of Civil Procedure sections 337 et seq., 338 et seq., 340 et seq. and all other relevant statutes of limitations.

EIGHTEENTH AFFIRMATIVE DEFENSE

(Coverage is Owed Based on Operative Terms of Policy)

As and for a eighteenth separate, distinct and affirmative defense to Plaintiffs' Complaint, Dependable Sheet Metal alleges that Fairmont and TIG's cause of action is barred based on operative terms of policy, including but not limited to, the scope of coverage afforded in the insuring clause, the definition of occurrence, bodily injury and the scope of the intentional act exclusion, with respect to each underlying action alleged in Plaintiffs' Complaint.

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